Supreme Court, U.S.
FILED

05-437 SEP 13 2005

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

SHARON BURKYBILE,
PETITIONER

v.

BOARD OF EDUCATION OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT AND JOHN J. RUSSELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT HELLMANN
30 North Seventh St.
PO Box 148
Terre Haute, in 47808
(812) 232-7035

JESSIE A. COOK
Counsel of Record
400 Wabash Avenue
Suite 212
Terre Haute, IN 47807
(812) 232-4634

Attorneys for the Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 675-4539 ♦ USSCINFO.COM

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals followed the precedent set by this Court in *McDonald v. West Branch*, 466 U.S. 284 (1984) when, in an action under 42 USC 1983, it affirmed the District Court's grant of summary judgment determining that petitioner's First Amendment retaliation claim was precluded by an award in a mandadory arbitration proceeding under New York Education Law relating to the discipline of tenured public school administrators.

PARTIES TO THE PROCEEDINGS

SHARON BURKYBILE, Ed. D., PETITIONER.

BOARD OF EDUCATION OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT, respondent.

JOHN J. RUSSELL, Individually and in his Official Capacity as Superintendent of the Hastings-on-Hudson Union Free School District.

This document is not filed by or on behalf of a nongovernmental corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS OF OPINIONS BELOW 1

BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT 7

CONCLUSION 13

APPENDIX

Circuit Court Opinion (06/15/05) 1a

District Court Order (12/29/03) 18a

Constitutional and Statutory Provisions Involved 19a

TABLE OF AUTHORITIES

Page

CASES

ALEXANDER v. GARDNER-DENVER CO., 415 U.S. 36 (1974) 8

BARRENTINE v. ARKANSAS-BEST FREIGHT SYSTEM, INC. 450 U.S. 728 (1981) 8

GILMER v. INTERSTATE/JOHNSON LANE CORP., 500 U.S. 20 (1991) 9

MCDONALD v. CITY OF WEST BRANCH, 466 U.S. 284 (1984) ..... *passim*

MITCHUM v. FOSTER, 407 U.S. 225 (1972) 7

UNIVERSITY OF TENNESSEE v. ELLIOTT, 478 U.S. 788 (1986) 6, 11

STATUTES

28 U.S.C. 1254(1) 1

28 U.S.C. 1331 2

28 U.S.C. 1343(3) 2

28 U.S.C. 1343(4) 2

29 U.S.C. 791 2

42 U.S.C. 1983 ..... i, 1, 2, 12

Article 75. N.Y. C.P.L.R. § 7511 5

N. Y. Educ. Law § 913 4

N.Y. Educ. Law § 3020 ..... 4, 9, 10

CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet published in official or unofficial reports. The opinion has been issued as a slip opinion in Docket No. 04-0905-cv, United States Court of Appeals for the Second Circuit and is attached hereto at Appendix (Appx. p. 1a). The District Court Judgment is attached hereto at Appx. p.18a.

BASIS FOR JURISDICTION IN THIS COURT.

The United States Court of Appeals for the Second Circuit issued its opinion on June 15, 2005. No rehearing was requested. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Civil Rights Act--42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief

shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Education Law, Article 61, section 2030-a is reproduced at Appx. p. 19a.

New York Civil Practice Law and Rules, Article 75, section 7511 is reproduced at Appx. p. 27a.

New York Civil Practice Law and Rules, Article 78, Section 7803 is reproduced at Appx. p. 29a.

STATEMENT OF THE CASE

This action was brought pursuant to U.S.C. 1983, The First Amendment to the Constitution of the United States, and 29 U.S.C. 791, et seq. Jurisdiction was conferred upon the District Court by 42 U.S.C. 1983 and 28 U.S.C. 1331 and 1343(3) and (4).

This petition seeks review of a decision of the United States Court of Appeals for the Second Circuit upholding a decision of the United States District Court for the Southern District of New York

The district court had dismissed petitioner's claim under 42 U.S.C. 1983, alleging retaliation for the exercise of petitioner's First Amendment rights. The district court held that the retaliation claim was precluded by an earlier hearing under Section 3020-a of the New York Education Law.

Burkybile and her immediate supervisor, respondent Russell, had a history of conflict. In October 2000, Burkybile received a poor performance evaluation from Russell, which Burkybile later rebutted in writing and at length. On December 1, 2000, Burkybile and Russell had a dispute at an official District dinner. Burkybile later filed a police report alleging that Russell grabbed her arm and shook her while verbally abusing her. Russell responded that an argument had arisen when Burkybile unreasonably refused to assist Russell with an emergency and potential crisis, but denied touching Burkybile. Later in December, Burkybile refused to approve a purchasing order for a replacement cell phone for Russell and canceled a business credit card, primarily in her name and secondarily in Russell's name, without notifying Russell.

On January 8, 2001, Burkybile spoke during a meeting of the defendant-appellee Board to accuse Russell of improper governmental actions. In response, the Board asked Burkybile not to attend future Board sessions and retained special counsel Ricki Roer to investigate Burkybile's accusations. On April 2, 2001, the Board decided to support Russell. Expressing a concern by Burkybile's behavior and possible mental instability, the Board placed Burkybile on paid leave on the same day.

Roer submitted her investigation report on April 26, essentially clearing Russell of fault and questioning Burkybile's job performance and professional judgment.

On May 21, 2001, the Board ordered Burkybile to submit to medical examination pursuant to New York Education Law § 913. Three doctors chosen by the Board conducted a series of examinations of Burkybile between August 21, 2001, and February 25, 2002, and between them diagnosed narcissistic disorder, borderline personality disorder, language problems, and possible indication of a degenerative brain condition known as Pick's Disease. These findings were controverted by Burkybile's three doctors. They diagnosed a depressive episode due to stress, adjustive disorder, and possible post-traumatic stress disorder, with significant improvement in symptoms over time.

The final medical report was completed on February 25, 2002. The next day, the Board found probable cause to bring a disciplinary proceeding against Burkybile based on charges brought by Russell, pursuant to Section 3020-a of the New York Education Law. A finding of probable cause initiates a disciplinary action under Section 3020-a. See N.Y. Educ. Law § 3020-a(2)(a). Upon receipt of the disciplinary charges, Burkybile requested a hearing under New York Education Law § 3020-a(3).

Burkybile filed the instant action on March 15, 2002, alleging, inter alia, infringement of her First Amendment rights in the form of retaliation by Russell and the Board for her accusations against Russell.

On June 24, 2002 the respondent board brought additional charges. In total, Burkybile faced eight charges, covering several dozen incidents and 154 specifications. The charges included mental disability,

incompetence, insubordination, neglect of duty, conduct unbecoming an administrator, and misconduct.

Respondents subsequently moved for summary judgment in the instant action. At Burkybile's request, the response to the motion was held in abeyance pending the outcome of the Section 3020-a hearing.

Burkbile and the Board proceeded to a Section 3020-a hearing. The hearing took place over fourteen days, spread out between November 7, 2002 and February 13, 2003. Five of the doctors who examined Burkybile testified, three for the Board and two for Burkybile. On July 18, 2003, the hearing officer issued a 153-page decision, finding that the Board proved all the charges brought against Burkybile, including the charge of mental disability and the vast majority of the specifications.

The hearing officer found that Burkybile was unable to perform her duties, was incompetent to a degree justifying termination, and had an unreasonably vengeful attitude towards Russell. He found just cause for discharge, and directed that Burkybile's employment be terminated.

Burkybile then filed a petition with the New York Supreme Court pursuant to Section 7511 of the New York Civil Practice Law and Rules. Section 7511 permits the New York Supreme Court to vacate an award for 1) corruption, fraud or misconduct; 2) partiality of the arbitrator; 3) exceeding the arbitrator's or agency's power or failing to make a final or definite award; or 4) failure to follow the procedures of Article 75. N.Y. C.P.L.R. § 7511. The petition was denied for

lack of any showing that the Section 3020-a hearing officer exceeded his power and lack of any allegation of fraud or bias.

Respondents then filed a letter memorandum with the district court arguing that under the doctrine of collateral estoppel, or issue preclusion, the present Section 1983 action was now precluded. The district court endorsed the memorandum, and granted summary judgment to defendants-appellees. The District Court's judgment reads:

JUDGMENT: ORDERED , ADJUDGED AND DECREED:

> That it is beyond dispute that the action is precluded, and that the defendant's motion filed on 04/25/2003 is granted, and the action is hereby dismissed.

Burkybile appealed. In the United States Court of Appeals for the Second Circuit she argued that the Section 3020-a hearing was in effect a labor arbitration, and therefore has no preclusive effect on subsequent judicial proceedings under the rule of *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984).

The Court of Appeals held: ". . . [T]hat the Section 3020-a hearing is a quasi-judicial administrative action whose findings are entitled to preclusive effect under *University of Tennessee v. Elliott*, 478 U.S. 788, 796-99 (1986)."